GOH AH BA

v.

TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ANOR.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
HASHIM YEOP SANI CJ (MALAYA)
MOHD. AZMI SCJ
[SC CRIMINAL APPEAL NO. 05-133-90]
13 FEBRUARY 1991

STATUTORY INTERPRETATION: *Detention orders - Extension orders - Fresh orders - Restriction orders - Whether valid - Effect of amendment - Orders made afresh - Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6A, 11A, 11B - Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1990.*

The applicant G was detained under an order (the first order) of the Deputy Minister for Home Affairs dated 16 May 1987 under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the 1985 Act) to take effect from 18 May 1987 for 2 years. On 29 April 1989, the Deputy Minister made another order extending G's detention under s. 11A(1)(a)(aa) of the 1985 Act, extending the detention for a further period of 2 years effective from 17 May 1989 (the extension order). On 3 April 1990, the Deputy Minister revoked the extension order and made a detention order under s. 6(1) of the 1985 Act (the second order) for G's detention for 13 months.

The 1985 Act was amended by the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1990 (the 1990 Act) which provides for the validation of orders rendered invalid by the Supreme Court in earlier cases.

The High Court held that s. 11(2) of the 1985 Act does not require as a condition that a fresh order or direction must be of the same type as the one that is revoked.

The issue for the Court is to what extent if any, is the power of the Minister conferred by s. 11B of the 1985 Act affected by the 1990 Act.

Held:

[1] Under s. 11B(2) of the 1985 Act, the Minister may make a fresh detention order or a fresh restriction order or a fresh direction under ss. 6(1) and (3) and s. 11A(1) of the 1985 Act in place of the order or direction revoked. The power is specific and distinct for each type of order or direction.

[2] (a) The very language of subsections (4) and (5) of s. 6 of the 1985 Act shows quite clearly the distinction made by the law between a detention order and a restriction order;

(b) therefore a fresh order may be made only to replace the detention order which is revoked and a fresh restriction order or direction may be made only to replace a restriction order or direction revoked. In other words only a fresh direction can be issued to replace an existing direction which has been revoked.

[3] (a) Looking at the new subsection (2) of s. 6A of the 1985 Act as inserted by amendment Act 1990, it is quite clear that it merely states that no fresh detention order or fresh restriction order shall be rendered invalid by reason of the absence of any fresh report under subsection (3) of s. 3 and subsection (4) of s. 5 of the 1985 or that the order was made on the same grounds as the previous detention order or restriction order;

(b) the new provision was clearly intended to overcome what this Court had required to be done in *Poh Chin Kay* namely that a detention order or direction made afresh would require compliance with the requirements of s. 6 of the 1985 Act;

(c) thus the new subsection (2) of s. 6A inserted by the 1990 Act did not alter the law except in so far as respects the validity of the detention order or restriction in the absence of the reports. The clear distinction between a detention order and a restriction order still remains intact.

[Appeals allowed.]

Cases referred to:

Chew Phang Oo v. Timbalan Menteri Dalam Negeri, Malaysia & Anor. [1990] 1 CLJ (Rep) 717
Goh Ah Ba v. Timbalan Menteri Dalam Negeri & Lau Ah Keat v. Timbalan Menteri Dalam Negeri [1990] 1 CLJ (Rep) 367
Hong Siew Sin v. Menteri Hal Ehwal Dalam Negeri & Ors. [1990] 1 CLJ (Rep) 121
Low Hai See v. Minister for Home Affairs [1990] 1 CLJ (Rep) 155
Poh Chin Kay v. Minister for Home Affairs & Ors. [1990] 1 CLJ (Rep) 155

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316), ss. 6(1), 11A(1)(a)(aa)

For the appellants in SC Cr. Appeal Nos. 05-133-90 & 05-135-90 - M. Athimulan; M/s. Shan & Gooi
For the appellants in SC Cr. Appeal Nos. 05-76-90, 05-151-90 - Karpal Singh; M/s. Karpal Singh & Co. (V. Shanmugam of M/s. Shanmugam & Co. with him)
For the respondents in all appeals - Suriyadi b. Halim Omar, Noorbahari b. Baharuddin & Jalaldin bin Hussain, DPPs

[**Editor's Note**: The following cases was heard together at this Supreme Court sitting:

List of Cases:

1. *Lau Ah Keat v. Timbalan Menteri Dalam Negeri, Malaysia & Anor.* (SC Criminal Appeal No. 05-135-90)
2. *Chuah Peng Lam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* (SC Criminal Appeal No. 05-76-90)
3. *Oh Peng Kee @ Oh Ba Bee v. Menteri Hal Ehwal Dalam Negeri & Anor.* (SC Criminal Appeal No. 05-151-90)]

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

As background to these appeals we would refer to Goh Ah Ba, the applicant in Penang High Court Criminal Application No. 44-17-90 and one of the appellants in the appeals before us who was originally detained under an order of the Deputy Minister for Home Affairs under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316). The detention order was made on 16 May 1987 directing the detention of the applicant for a period of two years at the Pusat Pemulihan Akhlak, Muar with effect from 18 May 1987.

On 29 April 1989 the Deputy Minister made another order extending the detention of the said applicant under s. 11A(1)(a)(aa) of Act 316 and directed the detention for a period of two years with effect from 17 May 1989.

On 3 April 1990 the Deputy Minister revoked the extension order made on 29 April 1989. On the same date the Deputy Minister also made a detention order under s. 6(1) of Act 316. That order directed the detention of the said applicant for a period of 13 months.

Act 316 was amended by the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1990 (Amendment Act A766). The amendment Act A766 *inter alia* provides for the validation of orders rendered invalid by this Court in *Hong Siew Sin v. Menteri Hal Ehwal Dalam Negeri & Ors.* [1990] 1 CLJ (Rep) 121 and *Poh Chin Kay v. Minister for Home Affairs & Ors.* [1990] 1 CLJ (Rep) 155. This Court also struck down detention orders purportedly made by virtue of the implied powers under s. 11B of Act 316 - see *Low Hai See v. Minister for Home Affairs* [1990] 1 CLJ (Rep) 155.

Section 11B of Act 316 provides as follows:

> (1) Notwithstanding anything contained in this Act, the Minister may at any time revoke any detention order made under subsection (1) of s. 6, or any suspended detention order, or any direction under subsection (1) of s. 11A for the extension of the duration of any such order, if he deems it just or fit to do so.
>
> (2) Any revocation under subsection (1) shall be without prejudice to the validity of the order or direction before its revocation or to anything done thereunder, or to the power of the Minister to make **a fresh detention order** under subsection (1) of s. 6 or **a fresh restriction order** under subsection (3) of s. 6 or **a fresh direction** under subsection (1) of s. 11A in respect of the person against whom the order or direction which is revoked was made or given. (Note emphasis)

The issue which is common in all these appeals is a question of power of the Minister conferred by s. 11B of Act 316 and whether or to what extent the power is affected by the amendment Act A766 which came into force on 3 April 1990. The issue is as reflected in the observation of K.C. Vohrah J in *Moo Meow Fatt v. Minister for Home Affairs & Ors.* Permohonan Jenayah Mahkamah Tinggi Alor Setar Bil. 44-17-90:

> It will be noticed that the power to make a fresh order or fresh direction is **"in respect of the person against whom the order or direction which is revoked was made (sic) or given"**. Reading the words which have been underlined it would mean that a fresh order or fresh direction must correspond with the original order or direction revoked; that is to say, if what is revoked, say, is a direction under s. 11A(1), then the (sic) only a fresh extension order may be made, not a fresh order under s. 6(1).

The learned Judicial Commissioner (Dato' Abdul Hamid bin Hj. Mohamed) in *Goh Ah Ba v. Timbalan Menteri Dalam Negeri* and *Lau Ah Keat v. Timbalan Menteri Dalam Negeri* [1990] 1 CLJ (Rep) 367 said at p. 371:

> Dalam penghakiman saya, subsection (2) tidak mensyaratkan bahawa perintah atau arahan baru yang dibuat itu mestilah dari jenis yang sama dengan yang telah dibatalkan.

It was the ruling of the learned Judicial Commissioner that subsection (2) of s. 11 of Act 316:

> does not require as a condition that a fresh order or direction must be of the same type as the one that is revoked.

The issue is now in focus.

It is clear that the learned Judicial Commissioner did not share the view expressed *obiter* by K.C. Vohrah J in *Moo Meow Fatt*.

In *Chew Phang Oo v. Timbalan Menteri Dalam Negeri, Malaysia & Anor.* [1990] 1 CLJ (Rep) 717 the learned Judge there (Datuk Edgar Joseph Jr.) also came to a different conclusion from that of the learned Judicial Commissioner. The impugned detention order in that case was dated 12 March 1990 authorising the continued detention of the applicant for the period of 18 months from that date. In his judgment the learned Judge said:

> As a matter of first impression, the words "a fresh detention order or ... a fresh direction as is mentioned under subsection (1) ..." can only mean another order or direction of the same kind as that revoked. To illustrate, the Minister can only substitute a fresh detention order upon revocation of a previous detention order or substitute a fresh direction that the duration of a detention order be extended upon revocation of a previous direction of the same kind.

As the issue was more lucidly examined in his judgment it is best that the relevant part of the judgment be reproduced:

> The question therefore arises whether the amendment effected by s. 3(1)(b) of the Act of 1990 to s. 6A that is by the insertion of s. 6A(2), can apply to exempt the executive from having before it the fresh reports concerned, before substituting a detention order for a direction.

It is necessary to reproduce s. 6A(2) which provides:

> (2) No fresh detention order or fresh restriction order referred to in subsection (2) of s. 11B shall be invalid or inoperative by reason that no fresh report has been submitted under subsection (3) of s. 3 and subsection (4) of s. 5 or that detention order or restriction order was made on the same ground as the previous detention order or restriction order.
>
> It will be seen that s. 6A(2) applies only to fresh detention orders or fresh restriction orders.
>
> Having regard to my view that the detention order in this case was not a fresh detention order because it was not made in substitution for a previous detention order but instead was in substitution for a direction extending the period of detention, I fail to see how s. 6A(2) can be of any assistance to the minister.
>
> It follows that the principles in *Poh Chin Kay's* case would continue to apply to the present case and so the necessity for fresh reports by the police officer and the enquiry officer under ss. 3(3) and 5(4) of the Act of 1985 respectively, cannot be dispensed with.

In another case dealing with the same matter before Shankar J in *Choo Fook Kam v. Inspector General of Police & Ors.* (Selangor Criminal App. No. 44-24-89) the learned Judge said at p. 22 of his judgment:

> What was revoked on 31 January 1990 was not the original detention order, but the direction for the extension which was made on the same grounds as the original order. What followed this was not a fresh direction under s.11A(1)(aa) but a "fresh" order under s. 6(1) of the Act.

At p. 23 he said:

> In terms of validity we once again come back to the question of power and I cannot find anything in s. 6(1) which authorises the issue of a fresh detention order in place of one totally revoked.

The question raised before the learned Judicial Commissioner and the learned Judges in their separate cases referred to earlier can be answered simply as follows.

Section 11B(2) of Act 316 preserves the Minister's power to make the order or direction as specifically mentioned in that subsection. The Minister may make a fresh detention order or a fresh restriction order or a fresh direction under ss. 6(1) and (3) and s. 11A(1) respectively of Act 316 in place of the order or direction revoked. The power is specific and distinct for each type of order or direction.

The very language of subsections (4) and (5) of s. 6 of Act 316 shows quite clearly the distinction made by the law between a detention order and a restriction order. Therefore a fresh order may be made only to replace the detention order which is revoked and a fresh restriction order or direction may be made only to replace a restriction order or direction revoked. In other words only a fresh direction can be issued to replace an existing direction which has been revoked.

Looking at the new subsection (2) of s. 6A of Act 316 as inserted by Amendment Act A766 it is quite clear that it merely states that no fresh detention order or fresh restriction order shall be rendered invalid by reason of the absence of any fresh report under subsection (3) of s. 3 and subsection (4) of s. 5 or that the order was made on the same grounds as the previous detention order or restriction order. The new provision was clearly intended to overcome what this Court had required to be done in *Poh Chin Kay* namely that a detention order or direction **made afresh** would require compliance with the requirements of s. 6 of Act 316.

Thus the new subsection (2) of s. 6A inserted by Act A766 did not alter the law except in so far as respects the validity of the detention order or restriction in the absence of the reports. The clear distinction between a detention order and a restriction order still remains intact.

The appeals are accordingly allowed.

Also found at [1991] 2 CLJ 877